Case No. S242799

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JULIA C. MEZA,
Plaintiff/Petitioner,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC, HUNT & HENRIQUES, MICHAEL SCOTT HUNT, JANALIE ANN HENRIQUES, AND ANTHONY J. DIPIERO,
Defendants/Respondents.

On Certified Question from the
United States Court of Appeals for the Ninth Circuit
Pursuant to California Rules of Court Rule 8.548
Ninth Circuit Case No. 15-16900

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* EAST BAY COMMUNITY LAW CENTER, PUBLIC LAW CENTER, AND HOUSING AND ECONOMIC RIGHTS ADVOCATES *IN FAVOR OF PETITIONER JULIA C. MEZA*

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Pursuant to the California Rules of Court, rule 8.520(f), the organizations described below respectfully request permission to file the attached brief as amici curiae in support of Appellants Eduardo de la Torre et al.

This application is timely made, per Rule 8.520(f) of the California Rules of Court and section 12 of the Code of Civil Procedure. No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity made a monetary contribution intended to fund the preparation or submission of the brief other than the *amici curiae*, their members, or their counsel in the pending appeal.

I. INTEREST OF *AMICI CURIAE*

The proposed amici curiae are public interest legal organizations that represent low-income Californians in consumer matters. Amici regularly represent consumers in debt collection suits brought by Respondent Portfolio Recovery Associates and by similar organizations. Code of Civil Procedure section 98 is frequently invoked in those suits. Amici are therefore well-versed in the landscape of debt collection suits in California, the role section

98 plays in that landscape, and the importance of the instant case for California consumers—especially those of limited means. Given their familiarity with debt collection practice, amici feel strongly that section 98 must be interpreted to include a requirement that a non-party declarant be physically present at the place designated for service. A contrary interpretation would seriously limit amici's clients' opportunity to fully and fairly litigate claims brought against them—an unjust outcome which this court should avoid.

The East Bay Community Law Center (EBCLC) is the largest provider of free legal services in Alameda County and a nationally-recognized poverty law clinic. EBCLC's Consumer Law Practice, in particular, provides legal assistance to hundreds of low-income consumers in the East Bay annually who are suffering from a variety of debt collection issues, including defending limited civil debt collection lawsuits brought by debt collectors like Portfolio Recovery Associates. The East Bay Community Law Center seeks to ensure that its clients have an opportunity to defend themselves in these lawsuits.

The Public Law Center is a non-profit legal services organization in Santa Ana, California that provides free civil legal services to low-income residents of Orange County, California. The substantive work performed by Public Law Center staff and volunteers is varied, including family law,

immigration, health, housing, veterans, microbusiness and consumer. In the Public Law Center's Consumer Law Unit, attorneys and staff assist low-income clients when dealing with a variety of debt issues, including defending debt collection lawsuits filed by debt collectors such as Portfolio Recovery Associates. Public Law Center has an interest in ensuring that its clients have the ability to adequately raise defenses to protect their rights in these limited civil cases.

Housing and Economic Rights Advocates (HERA) is a California statewide, not-for-profit legal service and advocacy organization. HERA's mission is to ensure that all people are protected from discrimination and economic abuses. HERA provides legal advice, advocacy and representation to low- and moderate-income Californians on consumer issues including predatory lending, foreclosure prevention, student loan debt, unfair credit reporting and debt collection. These services include legal representation of defendants in collection lawsuits filed by debt buyers, including by Portfolio Recovery Associates, LLC. HERA and its clients have a substantial interest in asserting the defenses and due process rights at issue in this case.

II. NEED FOR FURTHER BRIEFING

The proposed amici curiae believe that further briefing is necessary to explore matters not fully addressed by the parties' briefs—specifically, how the statute's purpose and constitutional implications should affect this

court's interpretation of section 98. To the extent that the statute is susceptible of two interpretations as to the question of whether it requires the physical presence of the declarant, the Court should be prefer the interpretation that best effectuates the purpose of the statute and avoids doubt as to the statute's constitutionality. As amici argue in the proposed brief, the interpretation that physical presence is required best fulfills those criteria.

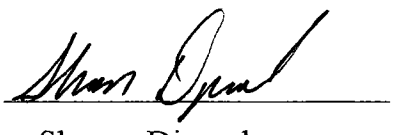
Furthermore, amici wish to convey the challenges that would be faced by low-income consumers were the court to find no requirement of physical presence. Based on their extensive collective experience with consumer debt collection defense, amici believe that such an interpretation would have serious consequences for their clients. The Court's decision should be informed by an understanding of section 98's practical—as well as its textual—context.

III. CONCLUSION

For the foregoing reasons, the proposed *amici curiae* respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: February 8, 2018

Respectfully submitted,

By: 

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CORPORATE DISCLOSURE STATEMENT

Amici curae have no parent corporations, and because they issue no stock, there are no publicly held corporations that own 10% or more of their stock.

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INTRODUCTION

The Ninth Circuit identified the "central" legal question of the present dispute as one of statutory interpretation. (*Meza v. Portfolio Recovery Associates, LLC* (9th Cir. 2017) 860 F.3d 1218, 1222 certif. to the Supreme Court.) Specifically, what does it mean for an affiant to be "available for service" at "a current address of the affiant that is within 150 miles of the place of trial," as required under Code of Civil Procedure section 98, subdivision a?[1]

In what follows, amici wish to draw this court's attention to a related question, one which should inform any answer to the first: what will it mean for low-income Californians if the proponent of a section 98 declaration is able to shift the costs of witness production onto its opponent in litigation?

Amici are legal services providers who represent low-income Californians in debt collection lawsuits, many of which are initiated by Respondent Portfolio Recovery Associates or similar debt buyers. In nearly all of those cases, debt buyers use section 98 declarations to submit the testimony of their custodians of records in order to authenticate documents purporting to show the existence and ownership of a debt.[2] Our clients'

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[1] All further statutory references are to the California Code of Civil Procedure unless otherwise indicated.

[2] Although original creditors also file small-dollar collection suits utilizing section 98 declarations, the focus of this brief is on bulk debt buyers like Respondent Portfolio Recovery.

ability to successfully defend these suits turns on whether they have a full and fair opportunity to challenge the validity of these documents.

Portfolio Recovery's interpretation of section 98 would strip low-income Californians of that opportunity. The right to confront adverse witnesses in a civil trial would be reduced to a privilege, available only to wealthy litigants who can afford to pay upfront costs. The scales of justice would be rebalanced in favor of corporate litigants like Portfolio Recovery at the disproportionate expense of people like our clients.

That result undermines the purpose of section 98 and violates litigants' constitutional rights to due process under the United States and California constitutions. In light of this suit's implications for fundamental questions of access to justice, this court must interpret section 98 to require the physical presence of non-party declarants at the place of service.

An interpretation of section 98 that does not require the declarant's presence contravenes the essential purpose of the statute by transforming it from a cost-*reduction* to a cost-*shifting* measure. That interpretation would force parties against whom declarations are offered to pay exorbitant witness fees if they seek to cross-examine declarants. The confrontation of adverse witnesses would be beyond the financial reach of low-income litigants represented by the amici—and non-profit legal services providers like amici are not in any position to cover these costs.

Both because it unjustly shifts the costs of witness production to opposing parties and because it interferes with litigants' right to *compel* (as opposed to request) the appearance of adverse witnesses, interpreting section 98 not to include a presence requirement violates litigants' right to due process. The right to confront adverse witnesses in a civil trial is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as by the California Constitution. An interpretation of section 98 which extinguishes that right for low-income litigants must therefore be avoided in favor of an interpretation that is "free from constitutional doubt." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373 [quoting *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548].)

Amici respectfully urge this court to construe section 98 in light of the construction's likely effects on *all* litigants, not just those with the financial means to afford the cost-shifting. In so doing, we believe, the Court must conclude that requiring the declarant's physical presence at the place of service is necessary in order to effectuate the purpose of the statute and preserve its constitutionality.

ARGUMENT

The plain language of section 98 requires that non-party declarants be physically present at the place designated for service. The statute requires parties offering section 98 declarations to designate "a current address of the

affiant that is within 150 miles of the place of trial" and that "the affiant [be] available for service of process at that place for a reasonable period of time, during the 20 days immediately prior to trial." (§ 98, subd. (a).) The most natural reading of the phrase "a current address of the affiant" is a fixed residence identifiable at the time of designation. The most natural reading of the phrase "available for service of process" is that the declarant is subject to service capable of compelling the declarant's appearance at trial. For non-party witnesses,[3] only personal service will do. (See *In re Abrams* (1980) 108 Cal.App.3d 685, 690 (holding that service of a subpoena on the appellant's attorney was insufficient to support a contempt charge for appellant's failure to appear).

However, even were the Court to find the text of section 98 ambiguous, the Court should still conclude that the statute requires the physical presence of the declarant. That interpretation best furthers the purposes of the statute—reducing costs and increasing access to the courts—and renders the provision free from constitutional doubt. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373.) By contrast, interpreting the statute not to require the declarant's presence would

[3] In rare cases—for witnesses who are parties to the action, officers, directors or managing agents of parties, or persons who otherwise have a personal interest in the proceedings—a notice served on the witness's attorney and, again, accompanied by the payment of travel costs, has "the same effect as [personal] service of a subpoena." (§ 1987, subd. (b).)

undercut those purposes and implicate litigants' rights to due process under both the United States and California Constitutions. Consideration of the statute's purpose and constitutional implications therefore resolve any textual ambiguity in favor of Petitioner's interpretation: that non-party declarants must be present at the place designated for service.

I. THE REQUIREMENT OF PHYSICAL PRESENCE BEST FURTHERS THE PURPOSE OF SECTION 98 BECAUSE IT REDUCES THE COST OF LITIGATION WHILE FACILITATING ACCESS TO THE COURTS IN SMALL-DOLLAR SUITS.

In construing statutes, California courts "ascertain the legislature's intent in order to effectuate the law's purpose." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527 [quoting *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387–388].) Where the statutory language does not indicate clear legislative intent, courts may "consider other aids, such as the statute's purpose, legislative history, and public policy." (*Ibid.*; see also *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 646 [committee reports]; *Merced Irrigation District v. Superior Court* (2017) 7 Cal.App.5th 916, 936 [legislatives sponsors' statements]; *Martin v. Szeto* (2004) 32 Cal. 4th 445, 450-451 [letters to the governor expressing opposition to a bill].) "[Courts] must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and

avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246 [citing *People v. King* (1993) 5 Cal.4th 59, 69]; see also *Cal. Charter Schools Assn. v. Los Angeles Unified School District* (2015) 60 Cal.4th 1221, 1237 ["When interpreting a statute...'we may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results'" (internal citations omitted)].)

The purpose of section 98 is best effectuated when the statute is read to require the physical presence of a declarant-witness at the designated place of service. The legislative history of the statute reveals that its purpose is to reduce the costs associated with litigating small-dollar lawsuits in order to facilitate access to the courts. The statute will only achieve those goals if section 98 is read to require the physical presence of the declarant. Conversely, an interpretation of section 98 which does not require the presence of the declarant at the place of service would lead to results that are absurd or contrary to the law's purpose by potentially increasing costs and impeding access to the courts.

i. The Purpose of Section 98 is to Reduce the Cost of Litigation in Order to Facilitate Access to the Courts for Parties to Small-Dollar Suits.

An inquiry into the history of Code of Civil Procedure section 98 reveals its twofold purpose: first, reducing costs; and second, facilitating

access to the courts for plaintiffs and defendants in small-dollar suits. The provision's progress from proposal to state law proceeded in three primary stages: first, as part of a two-county pilot project; second, as part of Assembly Bill 3170, proposed during the 1981-82 legislative session; and finally as part of Senate Bill 1820, which incorporated the provisions of Assembly Bill 3170 and went into effect on June 6, 1983. In all three stages of the process, supporters of the provision argued that cost-saving modified civil procedures were necessary to preserve access to the courts.

The modified civil procedure provisions codified in the Economic Litigation for Limited Civil Cases statutes (§§ 90-100) were initially conceived of as part of a pilot project proposed by the Economical Litigation Committee of the Los Angeles Bar Association and authorized by legislation in 1976. (Stats. 1976, ch. 960, § 1, p. 192 [repealed by Stats. 1994, ch. 146, § 26]).) The "purpose" of the pilot project was "to find ways of lowering costs and reducing delays in litigation." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3170 (1982-1983 Reg. Sess.) as amended April 21, 1982.) Reform was needed because, the Bar Association concluded, "cases are not now filed or defended because it is less costly to forego a just claim or pay an unjust demand than to prosecute or defend it." (Los Angeles Bar Association Special Committee on Economical Litigation, A Program of the Los Angeles Bar Association to Reduce Expenses of Litigation (Jan. 21,

1976) p. 12.) The Bar Association therefore designed the project to measure both reduction in costs to litigants and "the extent to which [modified procedures] achieve a greater or lesser degree of justice to the parties than do the procedures of the traditional adversary process." (*Id.* at p. 11.) These concerns were echoed by the text of the legislation authorizing the pilot program: "The Legislature finds and declares that the costs of civil litigation have risen sharply in recent years. This increase in litigation costs makes it more difficult to enforce smaller claims even though the claim is valid or makes it economically disadvantageous to defend against an invalid claim." (Stats. 1976, ch. 960, § 1, p. 192.)

In 1982, the same purpose motivated Assembly Member Maxine Waters to author Assembly Bill 3170, which provided for statewide "adopt[ion of] the most successful innovations" of the pilot project. (Sen. Com. on Judiciary, analysis of Assem. Bill No. 3170 (1982-1983 Reg. Sess.) as amended April 21, 1982.) A worksheet submitted by Waters to the Assembly Committee on the Judiciary identified the "problem...which the bill seeks to remedy" as follows: "Existing costly court procedures make suits too expensive for many civil litigants. Bill seeks to incorporate elements of the pilot project to incorporate state[w]ide." (Maxine Waters, Assem. Com. on the Judiciary "Work Sheet" for Assem. Bill No. 3170 (1982-1983 Reg. Sess.).) The Los Angeles Bar Association sponsored the new

legislation, reasserting that the reforms would reduce the cost of pursuing valid claims or defending invalid ones. (Los Angeles Bar Association, Statement of Support for Assem. Bill 3170 as amended April 21, 1982, May 4, 1982, p. 1.)

When Senate Bill 1820 (1981-1982 Reg. Sess.), authored by Senator Omer Rains, was amended on June 18, 1982 to incorporate the provisions of Assembly Bill 3170, those provisions carried with them their original purpose: reducing costs in order to increase access to the courts. (Roy H. Aaron, Los Angeles Bar Association, Letter to Governor Edmund G. Brown, Jr., Sen. Bill No. 1820, Sept. 10, 1982. ["It is currently economically disadvantageous to assert small valid claims as well as defend against small invalid claims in municipal and justice courts. SB-1820...would help alleviate this problem by reducing the cost of such litigation."].) The bill explicitly adopted the "most successful" elements of the Economic Litigation pilot project authorized in 1976. (*Ibid.*; Senator Omer Rains, Letter to Governor Edmund G. Brown, Jr., Sen. Bill No. 1820 (1982-1983 Reg. Sess.) Sept. 7, 1982; see also Ralph J. Gampell, Judicial Counsel of Cal., Letter to Governor Edmund G. Brown, Jr., Sen. Bill No. 1820, Sept. 10, 1982; Dept. of Finance, Enrolled Bill Rep. on Sen. Bill No. 1820 (1982-1983 Reg. Sess.) Sept. 13, 1982; Dept. of Legal Affairs, Enrolled Bill Rep. on Sen. Bill No. 1820 (1982-1983 Reg. Sess.) Sept. 27, 1982). Senate Bill 1820 was intended

to serve the same purpose as its predecessors, the pilot project and Assembly Bill 3170: reducing costs and protecting access to the courts for *all* parties.

Both the legislative history and text of the Economic Litigation statutes make clear that they were not intended to financially favor any particular party. Instead, lawmakers' intent was to reduce the costs of litigation vis-à-vis plaintiffs, defendants, and courts. The pilot program was initiated to address concerns about "cases...not now filed *or defended*" due to high costs. (Los Angeles Bar Association Special Committee on Economical Litigation, A Program of the Los Angeles Bar Association to Reduce Expenses of Litigation (Jan. 21, 1976) p. 12 [emphasis added].) Legislative committee reports similarly allude to the benefits to both plaintiffs and defendants intended to flow from the statutes' passage. For example, the Assembly Committee on the Judiciary referred to litigants' ability to "pursue valid claims *and meritorious defenses*." (Assem. Com. of Judiciary, analysis of Assem. Bill No. 3170 (1982-1983 Reg. Sess.) as introduced, p. 2 [emphasis added].) Additionally, the text of sections 90-100 reflects the same concern with reducing costs for both parties to litigation. For example, "[a]ny action may, upon noticed motion, be withdrawn from the provisions of this article, upon a showing that it is impractical *to prosecute or defend* the action within the limitations of these provisions." (§ 91, subd. (c); emphasis added.) The statute explicitly treats all parties

similarly. Given the text of the statutes and their legislative history, it is clear the legislature never intended to privilege either plaintiffs or defendants—and an interpretation primarily or solely benefiting one party would contravene the statute's purpose.

ii. Requiring the Declarant's Physical Presence Will Result in the Greatest Overall Reduction in the Cost of Witness Production While Facilitating Access to the Courts.

Section 98 is intended to reduce costs associated with witness production and specifically contemplates that parties may seek to offer the testimony of custodians of records and expert witnesses by declaration. (§ 98 ["The prepared testimony may include, but need not be limited to, the opinions of expert witnesses, and testimony which authenticates documentary evidence."].) The primary costs involved in the production or compulsion of any witness include the costs of the witness's travel to and from and lodging near the place of trial. Service of either a subpoena or non-subpoena notice under section 1987 must be accompanied by an offer to pay for the costs of the witness's travel and accommodation near the place of trial. (§ 1987, subds. (a), (b).)[4] Those costs are set by statute at $35 for each day that the witness must remain at the place of trial plus 20 cents per mile

[4] That Portfolio Recovery or litigants in its position may decline to require the payment of travel costs for the production of witnesses thus summoned is immaterial; in that case, any reduction in costs flows not from the provisions of the statute but from the proponent's refusal of the required offer.

that the witness must travel in both directions. (Gov. Code, § 68093.) Secondary costs may include any compensation owed to the witness for expert testimony—or, if the witness is called by her employer, for the witness's wages.

The costs of witness production are reduced under section 98 when the overall cost of complying with section 98 is less than the cost of traditional methods of witness production. The pilot project that spawned section 98 was designed to "determine whether in fact the experimental procedures reduce the expense of litigation [in comparison with]...the procedures of the traditional adversary process." (Los Angeles Bar Association Special Committee on Economical Litigation, A Program of the Los Angeles Bar Association to Reduce Expenses of Litigation (Jan. 21, 1976) p. 11.) Shifting costs from one party to the other does not reduce those costs. Instead, total savings are realized under section 98 only when some or all of the costs associated with traditional witness production—travel, lodging, and witness compensation—are avoided entirely.

A. Interpreting section 98 to require the declarant's presence at the place of service will align the incentive to reduce costs with the ability to do so.

Requiring the presence of the declarant at the place of service will reduce the overall costs of the declarant's travel and lodging because it allocates those costs to the party best able to control and limit them. Without

the requirement that declarants be physically present at the designated place of service, section 98 substantially shifts the cost of witness production onto the parties against whom their testimony is offered. This cost-shifting not only fails to reduce the overall cost of litigation, but could also render defending against small-dollar claims cost-prohibitive.

That would certainly be the case for our clients, low-income people for whom the upfront production of hundreds of dollars is an insurmountable obstacle.[5] A litigant in Redwood City seeking to compel the appearance of a declarant who lives in San Diego—a distance of 437 miles—could be required to make an upfront payment of at least $209.80.[6] It would generally be impossible for our clients to produce such a sum.

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[5] Eligibility for legal services from the East Bay Community Law Center is based on residence in Alameda County and income. A single-person household must have a monthly income of $2,729 or less; a household of three must have an income of $3,508 or less; a household of six must have an income of $4,521 or less. In December 2017, Zillow Research, which aggregates data about regional housing markets, estimated the median rent for a one-bedroom apartment in Oakland at $2,200 per month (Zillow Research, Data, "Median Rent List Price ($), 1-Bedroom," by county, at https://www.zillow.com/research/data/> [as of Jan. 22, 2018]). Eligibility for legal services from the Public Law Center is based on residence in Orange County and income. A single-person household must have a monthly income of $3,653 per month or less. In December 2017, the median rent for Anaheim, one of PLC's major service areas, was $2,038 per month (Orange County Workforce Investment Board, Housing, December 2017).

[6] 2(437 x $0.20) + $35=$209.8.

Even for parties with greater financial means, Respondents' interpretation of section 98 could make full litigation of claims cost-ineffective. Amici frequently represent defendants in suits brought by Portfolio Recovery and other debt buyers in which the amount in controversy is less than $2,000—sometimes less than $1,000. In a May 2017 hearing before the Senate Standing Committee on the Judiciary, a lobbyist for Encore Capital Group[7] testified that "on average, consumer debt is in the $2,000 balance range." (Sonia Gibson, testimony before Sen. Standing Com. on the Judiciary, Sen. Bill No. 298 (2016-2017 Reg. Sess.) May 2, 2017, at https://ca.digitaldemocracy.org/hearing/52532?startTime=1388&vid=e7d76fc99f0288260c8db505883c0a22 [as of Jan. 29, 2018].) The same representative later testified that the mean sum Encore seeks to collect via bank levy is $500. (Sonia Gibson, testimony before Assem. Standing Com. on the Judiciary, Sen. Bill No. 298 (2016-2017 Reg. Sess.) June 27, 2017, at https://ca.digitaldemocracy.org/hearing/53965?startTime=120&vid=2c1ddfe3fa2d96e5c0ba14ec55dc4bb3 [as of Jan. 22, 2018]; see also Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers* (2014) 26 Loyola Consumer L. Rev. 179, 205-206 [finding that of 4,400 debt buyer

[7] Encore is one of Portfolio Recovery's main competitors (see Consumer Financial Protection Bur., Press Release, CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts, Sep. 9 2015 [describing Portfolio Recovery and Encore as "the two largest debt buyers" in the United States]).

suits filed in Maryland, 27 percent concerned amounts less than $1,000 and 56 percent concerned amounts between $1,000 and $5,000; a figure on p. 206 suggests that approximately half of suits in the latter category were for amounts between $1,000 and $2,000].) Where the amount in controversy is so low, a litigant might reasonably decide that gambling an additional $209.80 to compel the appearance of an out-of-state witness—significantly increasing her potential losses—is not worth the risk.

Additionally, shifting the burden of declarant's travel costs to section 98 opponents could lead to an increase in the overall costs of litigation—as well as the unfair displacement of those costs onto the party against whom section 98 evidence is offered. Under Respondents' interpretation, a party would not be able to predict the amount of a declarant's travel costs before deciding whether to pursue cross-examination. The party would be informed only of the designated location for service—not the location where the declarant is physically located. (See § 98.) Therefore, a litigant would be forced to decide whether to cross-examine a declarant without knowing whether that choice would cost $209.80 or $1,039.[8]

The proponent is in the best position to reduce witness production costs by choosing its witnesses so as to avoid unnecessary expenses. For

[8] Amici have litigated a number of cases in which Portfolio Recovery has used section 98 declarants from its headquarters in Norfolk, Virginia, approximately 2,510 miles from Redwood City. 2(2,510 x $0.20) + $35=$1039.

example, a party who frequently initiates litigation in California might realize savings under section 98 by identifying a local expert witness who resides within 150 miles of the courthouses in which it often appears, rather than bringing in an out-of-state witness. That decision would eliminate costs associated a witness's travel to and lodging for 20 days before the production of a remote witness. Respondents' interpretation, by contrast, separates the ability to reduce costs from the incentive to do so. Unlike the proponent, the opponent has no ability to choose a local, rather than distant, witness. If she seeks to compel the appearance of a declarant, she must do so at a price substantially set by her adversary. An interpretation of section 98 that does not require the presence of the declarant therefore gives section 98 proponents a strategic reason to increase costs, making litigation *more* expensive than it would be otherwise.

Of course, a party in a limited civil case is never *required* to utilize section 98. In traditional litigation, parties are required to produce their own supporting witness at trial and cover the cost of the witness's travel and lodging. Section 98 allows a party the option to produce a witness's testimony via declaration if it is more cost effective than producing a live witness, so long as the statutory requirements are met. If complying with the statutory requirements of section 98 becomes more expensive than producing

a live witness, the party may follow the traditional litigation procedures and produce its own witness at trial.

Respondents' argument that a presence requirement will burden proponents with substantial costs associated with the temporary relocation of witnesses (Respondents' Answer Brief on the Merits, p. 49, *Meza v. Portfolio Recovery Associates, LLC*, review granted Aug. 23, 2017, S242799) ignores the numerous alternatives available to litigants in Portfolio Recovery's position. Any increased costs to the proponent as a result of the proponent's election to invoke section 98 are therefore attributable not to the statute itself but to the proponent's own choices. Whether there are strategic reasons for those choices is a decision best left to proponents—so long as they also bear the associated costs.

Regardless of whether Portfolio Recovery intends to use the statute to shift costs to their opponents, their interpretation of section 98 will hand sophisticated litigants a powerful weapon with which to intimidate Californians who might otherwise challenge them in court. That result could not be more contrary to the statute's purpose.

B. With the presence requirement, section 98 improves litigants' ability to pursue valid claims and raise valid defenses in the kind of suits envisioned by the statute.

Section 98's purpose is to reduce the cost of litigation as a means to the end of ensuring that it remains cost-effective to either pursue or defend

small-dollar lawsuits. An interpretation of section 98 that requires the declarant's presence at the place of service achieves that end.

The Economic Litigation statutes were specifically intended to reduce costs in low-dollar suits brought or defended by "small litigants." (Maxine Waters, statement to the Assem. Com. on the Judiciary, Assem. Bill No. 3170 (1982-1983 Reg. Sess.).) The governor's legal affairs secretary described the pilot project as designed to address the problem of access to the courts for "low- and middle-income people." (J. Anthony Kline, Enrolled Bill Report to Governor, Sept. 9, 1976). (See also Associated Press, *Brown Boosts Easier Small Civil Suits*, Sac. Bee (March 15, 1976)).

Where parties to small-dollar suits offer the testimony of local expert witnesses, invocation of section 98 may result in substantial savings and preserve access to the courts for litigants whose cases would otherwise be cost-ineffective. Imagine a low-dollar tort suit where the defendant contests only liability and the testimony of a doctor is necessary solely to establish damages. Assuming the doctor works or resides within 150 miles of the place of trial, section 98 could significantly reduce costs by allowing the plaintiff to offer the doctor's written testimony rather than paying the doctor to appear in court. If the defendant opted not to challenge the claim of damages but focus only on the claim of liability, neither party would incur the costs of producing the witness, and both parties would save the time they would have

spent on direct and cross-examination. The defendant would be free to make that decision without being asked to clear a significant financial hurdle.

Portfolio Recovery, of course, is anything but a small litigant—though many of the people against whom it brings suit, our clients included, meet that description. If, unlike in the scenario above, Portfolio Recovery's invocation of section 98 does not lead to substantial savings when the declarant's presence is required at the place of service, that may be because of a poor fit between Portfolio Recovery's needs and the provisions of the statute.

There is one kind of suit we can be sure the legislature did not envision when drafting section 98 in 1982: small-dollar suits against individuals by national debt buyers. According to the Federal Trade Commission, the debt buying industry did not emerge until the late 1980s and early 1990s (Fed. Trade Com., The Structure and Practices of the Debt Buying Industry (Jan. 2013) p. 12). In a pre-debt buying era, it is unlikely that the legislature imagined that large corporate entities would frequently pursue claims of less than $2,000.

Debt buyers have dramatically altered the landscape of debt collection litigation in ways the 1982 legislature could not have foreseen—which may explain why section 98 is ill-suited to the kind of suits Portfolio Recovery typically brings. The emergence of the debt buying industry has contributed

to a dramatic increase in the number of debt collection lawsuits. (See Paul Kiel, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine* (May 5, 2016) ProPublica < https://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine> [as of Jan. 24, 2018].) For example, data collected by ProPublica indicates that between 1996 and 2011, the total number of collection suits filed in the state of New Jersey increased from 489 to 232,874—an increase of over 475 percent. (See ProPublica, Debt Collection Datasets (Jan. 2018) <https://www.propublica.org/datastore/dataset/debt-collection-datasets> [as of Jan. 24, 2018].) Debt buyers' suits increased from less than half of one percent of all debt collection suits in the state in 1996 to over 48 percent in 2011—an over 1000 percent increase.[9] (*Ibid.*) These figures reflect national trends; a 2009 report by the Federal Trade Commission described debt buying as "the most significant change in the debt collection business in

[9] The ProPublica data shows similar trends in other locations; in three counties in Missouri, the total number of debt collection lawsuits increased by over 128 percent from 2001 to 2013; debt buyer suits as a proportion of collection suits increased by over 453 percent. In New Mexico, the total number of debt collection suits increased by over 138 percent between 2000 and 2014; the proportion of those suits initiated by debt buyers increased by over 2,600 percent. In Indiana, between 2010 and 2014 alone, the number of collection suits increased by over 90 percent and the proportion of those suits brought by debt buyers increased by over 103 percent. (See ProPublica, Debt Collection Datasets (Jan. 2018) <https://www.propublica.org/datastore/dataset/debt-collection-datasets> [as of Jan. 24, 2018] [some figures stated here are the result of amici's calculations based on ProPublica's data].)

recent years" (Fed. Trade Com., Collecting Consumer Debts: The Challenges of Change (2009) p. 13) and noted "the vast number of debt collection suits" filed during the same period. (*Id.* at 55.)

Because, before the emergence of debt buying, the legislature could not have foreseen that wealthy, corporate litigants would file large numbers of low-dollar suits, it is unlikely that section 98—originally conceived of in the late 1970s—was intended to cater to the needs of parties like Portfolio Recovery. A mismatch between the small-dollar, small-litigant cases envisioned by the legislature and the suits routinely brought by Portfolio Recovery offer at least a partial explanation of why section 98 may be less effective at reducing costs in such cases. If Portfolio Recovery now wishes to rewrite the statute to better fit its needs, the proper place is the legislature.

II. SECTION 98 MUST BE INTERPRETED TO REQUIRE THE PHYSICAL PRESENCE OF A NON-PARTY WITNESS IN ORDER TO PRESERVE THE CONSTITUTIONALITY OF THE STATUTE.

"A person's right of cross-examination and confrontation of witnesses against him in noncriminal proceedings is a part of procedural due process." (*August v. Dept. of Motor Vehicles* (1968) 264 Cal.App.2d 52, 60.) There is only one way to compel a non-party witness to appear at trial: personal service of a Civil Subpoena. (§§ 1985, 1987, subds. (a), (b).) Therefore, only if the declarant is available for personal service of process can the adverse party—and the court—compel the declarant's appearance at trial for cross-

examination. To strip a party in a limited civil action of the rights afforded parties in all other unlimited civil and small claims cases is arbitrary and a violation of due process rights.

In most debt collection cases seen by amici, non-party custodians of record sign declarations but fail to be physically available at an address within 150 miles from the courthouse as required by section 98. By denying litigants the ability to personally serve the declarant in order to ensure the court has jurisdiction over the witness, proponents leave their opposing parties with two bad choices: either improperly serve a subpoena by substitute service and hope the witness appears or give up the opportunity to cross-examine the declarant. If the Court reads section 98 as Respondents suggest, the statute would arbitrarily allow these unpredictable results to occur in only limited civil cases and not in other civil cases in Superior Court, which would be unconstitutional. And because a statute must be read to preserve its constitutionality, section 98 cannot be read to eliminate the due process rights afforded to all civil litigants. Consequently, section 98 must maintain the right to compel the appearance of a non-party witness.

i. The Court Must Favor Statutory Interpretations That Are Free From Constitutional Doubt.

The canon of constitutional avoidance requires ambiguous statutes to be construed in a way that avoids serious constitutional problems. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373; *Clark v. Martinez* (2005)

543 U.S. 371, 381.) This court should follow well-settled rules of statutory interpretation and adopt a reasonable interpretation of the statute which is "free from doubt as to its constitutionality." (*People v. Gutierrez*, *supra*, at p. 1373 [quoting *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548].) This Court has repeatedly reaffirmed the precept that, if there is more than one reasonable construction of a statute, "one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions" courts should "adopt the construction which ... will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable." (*Id.*) Furthermore, courts require a clear statement from the legislature before they will adopt a constitutionally questionable interpretation of a statute. (See *id.* [noting that the canon of "constitutional doubt" is based, in part, on "a judgment that statutes ought not to tread on questionable constitutional grounds unless they do so clearly"].)

Amici believe the plain reading of section 98 requires a declarant to be available for personal service of a subpoena to compel their appearance at trial. However, to the extent the Court finds the language of section 98 ambiguous, the Court's ultimate interpretation of section 98 must be guided by the canon of constitutional avoidance. In all other civil cases, whether they are in unlimited or small claims courts, only a personally served subpoena

gives the court jurisdiction over a non-party witness. There is no other way to *compel* a non-party witness to appear at trial. Based on Respondents' interpretation of the statute, parties in limited civil cases would not be able to compel section 98 declarants to attend trial. This jeopardizes litigants' right to cross-examine adverse witnesses, which is a core tenant of due process under both the California Constitution and the Fourteenth Amendment. Because Respondents' interpretation of section 98 raises serious constitutional questions, the court must adopt the reasonable interpretation championed by the Petitioner and undersigned amici.

iii. Portfolio Recovery's Interpretation of Section 98 Would Violate Both Federal and State Procedural Due Process Rights.

The Due Process Clause of the Fifth Amendment provides that no person shall be deprived of "life, liberty, or property without due process of the law." (U.S. Const., 5th Amend.) This Constitutional safeguard is extended to the actions of States by the Fourteenth Amendment. (U.S. Const., 14th Amend.) To establish that a property interest is implicated by federal procedural due process, a party must establish actual ownership of real estate, chattels, or money, or an interest in less tangible property. (*See Board of Regents v. Roth* (1972) 408 U.S. 564, 571-72.)

A proponent's invocation of section 98 when a declarant is more than 150 miles from the courthouse in debt collection suits violates the opponent's federal due process rights because it materially and arbitrarily harms their

chances of successfully defending those suits. Consumer-litigants in debt collection cases have a clear right to their own tangible property: the amount of the alleged debt. If this Court were to construe section 98 as Portfolio Recovery proposes, defendants in debt collection suits like the instant case would be denied the right to cross-examine key non-party witnesses. If that denial led to an adverse judgment, the defendant would effectively be deprived of a property interest, whether the debt collector seeks the defendant's savings, wages, or equity in real property.

The California Constitution similarly protects an individual's due process rights from state action. (Cal. Const., art. I, § 7.) Unlike an analysis conducted under the Fourteenth Amendment, California due process rights do not require a showing of specific property interest, but rather presume the individual has a liberty interest in being free from arbitrary adjudicative procedures. (See *People v. Ramirez* (1979) 25 Cal.3d 260, 267 [quoting *Wolff v. McDonnell* (1974) 418 U.S. 539, 588].)

Section 98 implicates due process rights protected by the California Constitution because it arbitrarily inhibits a litigant's ability to cross-examine adverse witnesses. A litigant in a civil trial has the right to cross-examine any adverse witness on whose testimony an opposing party relies. For the legislature to deny this fundamental right to only certain parties, e.g., those involved in limited civil litigation, but allow it for parties involved in both

unlimited civil and small claims actions, would be the height of arbitrary adjudicative procedure. All parties, including consumers involved in low-dollar debt collection cases, have a liberty interest in the fair application of civil procedure.

iv. The Opportunity to Cross-Examine a Witness is Required to Protect Litigants from Unjustified Deprivation of Liberty and Property Interests

The due process protections of both the Fourteenth Amendment and California Constitution include a guarantee of fair procedure before a person can be deprived of a protected interest. (*Zinermon v. Burch* (1990) 494 U.S. 113, 125; *People v. Ramirez* (1979) 25 Cal.3d 260, 267.) The procedural due process requirement is intended to protect persons from mistaken or unjustified deprivation of life, liberty, or property. (*Carey v. Piphus* (1978) 435 U.S. 247, 259.) Thus, when important decisions turn on questions of fact, "due process requires an opportunity to confront and cross-examine adverse witnesses." (*Goldberg v. Kelly* (1970) 397 U.S. 254, 269; see also *Giddens v. State Bar* (1981) 28 Cal.3d 730, 735-736 [finding that defendant was deprived of his right to a fair hearing, where he was not allowed to cross-examine adverse witnesses].)

In order to protect themselves from mistaken deprivation of their property, consumer-defendants in debt collection suits must have the opportunity to cross-examine the custodians of records, whose testimony is

frequently offered through section 98 declarations. In debt collection cases, the court must make several findings of fact to determine if a consumer owes the claimed debt. The court must ascertain whether the debt collector can show chain of title, whether the statute of limitations has already run, how the amount pled was calculated, and whether accurate business records were kept, among other necessary facts.[10] Debt collectors frequently rely on the written testimony of custodians of records to authenticate the business records they offer to support their claims. If consumer-defendants are unable to challenge the assertions made in this testimony, the court is left to make findings of fact based on the custodians' assertions alone, greatly increasing the likelihood that defendants will be erroneously deprived of their liberty and property interests.

Section 98 avoids foreclosing the consumer's due process right to cross-examine the custodian of records only if it requires that the witness be available for personal service within 150 miles of the courthouse. If the consumer waives the right to cross-examine the witness, the declaration, to the extent it is otherwise admissible, can substitute for live testimony. On the

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[10] See the National Center for State Courts report *A Call to Action: Achieving Civil Justice for All: Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee* ((2016) Appendix I, Problems and Recommendations for High-Volume Dockets, p. 7 at <http://www.ncsc.org/~/media/Microsites/Files/Civil-Justice/NCSC-CJI-Appendices-I.ashx>) for factual problems that arise uniquely in debt collection cases.

other hand, a consumer who wishes to exercise the right to cross-examine the custodian of records retains the ability to compel the witness-declarant's appearance at trial.

v. In Order to Compel a Non-Party Witness to Appear at Trial, Personal Service of a Subpoena is Required

In the section 98 declarations submitted by the proponent in debt collection cases, the witnesses testify that they are employees of a debt collection company and are custodians of that company's records. These non-party witnesses can only be compelled to attend by being personally served a subpoena (§§ 1985, 1987, subd. (a)). Portfolio Recovery's reading of section 98 completely disregards the law's requirement that a subpoena be served personally. Portfolio Recovery suggests that serving a non-party witness by substitute service would simply put the burden on the office that receives the subpoena to ensure the non-party witness appears at trial,[11] but in fact this procedurally improper reading strips both the court and the consumer of the ability to *compel* the witness to appear. In this way, the

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[11] In Meza's underlying case, the debt collector's attorney was authorized to accept the notice at the attorney's address. This is not always so (see *Midland Funding LLC v. Romero* (2016) 5 Cal.App.5th Supp. 1, 5 [five attorneys at five different addresses across the state were authorized to accept substitute service, though none of them were counsel in the case]; *Target Nat. Bank v. Rocha* (2013) 216 Cal.App.4th Supp. 1 [the debt collector's attorney was authorized to accept service at the address of a process server]; *Portfolio Recovery Associates, LLC v. Kim* (Oct. 19, 2016, 30-2015-00777169) [nonpub. opn.] [the office of a process server was authorized to accept service]).

proponent maintains control over whether the witness's testimony will be heard. Because the court's power to compel the witness's appearance is established only by personal service of a subpoena, a witness could decline to respond to a non-subpoena notice and neither the court nor the consumer could do anything about it. The proponent's cat-and-mouse game prevents litigation from being a fair procedure, as required by both the state and federal Constitutions, and violates the consumer's due process rights.

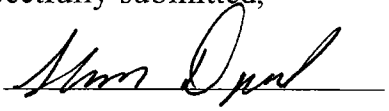
Respondents' interpretation of section 98 ensures that section 98 proponents always have the upper hand in limited civil cases, subjecting consumers to an arbitrary adjudicative procedure in violation of consumers' due process rights.

CONCLUSION

In light of the foregoing, amici respectfully urge the Court to adopt Petitioner Julia C. Meza's interpretation of Code of Civil Procedure Section 98: that it requires the physical presence of the declarant-witness at the place of service. Any other interpretation cuts against the purpose and constitutionality of the statute—and would devastate our clients' right to a fair trial before they are deprived of their property and liberty interests.

Dated: February 8, 2018

Respectfully submitted,

By: 

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CERTIFICATION OF WORD COUNT

I, Sharon Djemal, counsel for *amici curiae*, hereby certify, pursuant to the California Rules of Court, Rule 8.204(c), that according to the word count in Microsoft Word, this brief contains 7,670 words, including footnotes and headings but exclusive of tables and signature blocks, this certificate of compliance, the cover page, and the declaration of service.

DATED: February 8, 2018 By: 

Sharon Djemal

CERTIFICATE OF SERVICE

I, Sharon Djemal, hereby certify that: I am a citizen of the United States, over the age of 18 and not a party to this action. I am a resident of or employed in the county where the mailing occurred. My business address is East Bay Community Law Center, 1950 University Ave., Suite 200, Berkeley, CA 94704.

On February 12, 2018, I caused a copy of the following to be served:

APPLICATION TO FILE BRIEF AND BRIEF OF AMICI CURIAE EAST BAY COMMUNITY LAW CENTER, PUBLIC LAW CENTER, AND HOUSING AND ECONOMIC RIGHTS ADVOCATES IN SUPPORT OF APPELLANTS

On the following interested parties in this action by placing the documents listed above in a sealed envelope with postage thereon fully prepaid, for deposit with the United States Postal Service at Berkeley, California, addressed as set forth below:

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1 copy to	The Honorable Lucy H. Koh 280 South 1st Street Courtroom 8, 4th Floor San Jose, CA 95113 District Court Judge

1 copy to

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: February 12, 2018 By: _____

Sharon Djemal